No. 108.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 108.

SIMON ROTHSCHILD AND FRANK ROTHSCHILD, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF S. ROTHSCHILD & BRO., PLAINTIFFS IN ERROR,

v.

ROBERT A. KNIGHT, ASSIGNEE IN INSOLVENCY OF JAMES McKEON.

BRIEF OF PLAINTIFFS IN ERROR

ON MOTION TO DISMISS OR AFFIRM.

HARRY J. JAQUITH,
THOMAS J. BARRY,
Counsel for Plaintiffs in Error.

BOSTON:
NATHAN SAWYER & SON, PRINTERS,
DEAN BUILDING, No. 60 INDIA STREET.
1901.

Supreme Court of the United States.

No. 108. October Term, 1901.

SIMON ROTHSCHILD and FRANK ROTHSCHILD,
Plaintiffs in Error,

v.

ROBERT A. KNIGHT, Assignee in Insolvency.

BRIEF OF PLAINTIFFS IN ERROR.

In Error to the Superior Court of the State of Massachusetts.

Statement of the Case.

The original action was alleged to be in contract or tort, and was by an assignee in insolvency appointed by a Massachusetts state court under authority of a state statute, who assumed to avoid by virtue of the authority given him by said statute contracts between the plaintiffs in error, citizens of New York, and the insolvent, a citizen of Massachusetts, and to repudiate and annul the judicial proceedings in New York in an action between the plaintiffs in error and the insolvent, and to recover the value of merchandise bought by the plaintiffs in error at an execution sale in New York City by the sheriff of the county of New York. In the course of the proceedings below numerous omissions and errors were made by the defendant in error, but on examination the Supreme Judicial Court of Massachusetts declared the procedure sufficient to support the judgment, although the plaintiffs in error raised the question that the pro-

ceedings did not constitute due process of law under the constitution of the United States, and were repugnant to article 1, section 10, and article 4, section 1, of the constitution.

The court below held that a debt contracted in New York and payable in New York could be reached by the trustee process in Massachusetts (Record, pp. 3, 4); that a failure to comply with the provisions of chap. 164, P.S. Mass., relating to actions against absent defendants was immaterial, and that failure to continue the action as required by statute did not abate it;

That a misjoinder of inconsistent causes of action in contract and tort without an averment that they are for one and the same cause of action is a sufficient procedure, although the effect of the verdict depends on whether the verdict was on the count in contract or in tort;

That a verdict so rendered is not ambiguous;

That an attorney retained to defend a transitory action against a non-resident could consent to changing it into a local action for a penalty by virtue of such retainer;

That under Massachusetts practice it is permissible, after trusteeing the property of a foreign defendant in a transitory action and getting him into court to protect his property, to amend the action into one that is local and for a penalty and hold the defendant to his appearance.

The plaintiffs in error submit that this construction of chaps. 157, 164, and 183 P. S. Mass. deprives them of a constitutional right to immunity from extra-territorial laws and from being haled into the courts of a foreign state for an alleged infraction of its laws, except by personal service or requisition, the acts complained of having been done in New York and under the laws of New York.

These acts clearly appear in the record on the following pages:

Simon and Frank Rothschild, the plaintiffs in error, are brothers and compose the firm of S. Rothschild & Brother; both reside in New York City and have their usual place of business there (Record, p. 20). Among their customers was one James McKeon, having his usual place of business and residence in Springfield, Mass. (Record, p. 20.)

On the twentieth day of December, 1895, James McKeon owed S. Rothschild & Brother, the plaintiffs in error, three thousand eight hundred and sixty-five dollars and twenty-five cents ($3,865.25). (Record, p. 35.)

December 20, 1895, Frank Rothschild, Jr., an employee of the plaintiffs in error, having their authority to use his judgment in the collection of debts due them, went to Springfield in their behalf and also that of another New York firm, S. F. & A. Rothschild, to whom Mr. McKeon owed two thousand dollars ($2,000). (Record, p. 38.)

Frank Rothschild, Jr., on interrogating McKeon the next day, learned that he was insolvent. Thereupon it was agreed that the firm of S. Rothschild & Brother should furnish the cash to make a compromise offer of twenty-five cents ($0.25) on the dollar to McKeon's creditors, — McKeon to send goods to them in New York to secure them on their promised advances. This was done on the 20th of December, 1895, and a receipted bill made for the goods. (Record, pp. 39–42.)

Thereafter, in pursuance of said agreement, Frank Rothschild, Jr., advanced to McKeon the sum of one hundred dollars ($100), with which to effect an extension of a pressing debt, and this sum is credited by the plaintiff below in his declaration. (Record, pp. 40 and 18.)

December 22, 1895, McKeon went to New York and conferred with the plaintiffs in error at the office of their attorneys, Einstein & Townsend. At the suggestion of Mr. Einstein, that the receipted bill did not show the true transaction, McKeon tore the receipt off and marked the bill "Memo." (Record, pp. 36, 37.)

December 23, 1895, plaintiffs in error sued McKeon in the New York Supreme Court for the city and county of New York, making service on him personally and attaching the goods on the "Memo." invoice. (Record, p. 37.)

December 23, 1895, the plaintiffs in error, in furtherance of the agreement made by their employee, agreed to release their attachment and discontinue proceedings if McKeon effected a composition in fifteen (15) days. (Record, p. 51.)

December 27, 1895, part of the goods were replevied by L. Cohen & Brothers, who sold them to McKeon, and the plaintiffs in error gave bonds for their value. The suit is still pending. (Record, p. 35.)

McKeon did not effect a compromise, and the plaintiffs in error never advanced anything under their agreement except the one hundred dollars ($100) advanced by Frank Rothschild, Jr., in Springfield. (Record, p. 45.)

Later the plaintiffs in error secured judgment, and the goods were sold at an execution sale in New York by the sheriff of the county for two thousand nine hundred and eighty-two dollars ($2,982), which price the plaintiffs in error bid for them. (Record, pp. 41, 53.)

A petition in insolvency was filed against McKeon in the Insolvency Court for Hampden County on January 7, 1896. The defendant in error was appointed assignee February 20, 1896. (Record, p. 25.)

April 17, 1896, the defendant in error, as assignee of McKeon, brought suit by the trustee process in the Superior Court for Hampden County, the writ being returnable the first Monday in May, 1896. The officer's return shows service on the trustee, but none on the plaintiffs in error. (Record, pp. 14–16.)

On the return day of the writ, a justice of the Superior Court was sitting in Hampden County, and on the 8th of June, 1896, another sitting of the Superior Court was held. (Record, p. 5; P.S. Mass., chap. 152, sect. 17; Acts 1885, chap. 27.)

No continuance was asked, nor was any suggestion made to the court that the plaintiffs in error, then defendants, were absent from the state and unserved, until at a sitting of the Superior Court, July 8, 1896, when such suggestion was made and order of notice by publication was granted, returnable the first Monday in September, 1896. (Record, pp. 19, 56; Rule 54; Record, p. 5.)

The record does not show any service by publication, but at the hearing before the single justice evidence was admitted against the objections of the plaintiffs in error to show that service was actually made as ordered. (Record, pp. 3, 56, 58.)

September 16, 1896, C. C. Spellman, Esq., appeared generally for the plaintiffs in error, under Rules X. and XII. of Superior Court, and never withdrew as counsel of record. (Record, pp. 3, 21.)

June 19, 1897, the defendant in error filed an amendment to his declaration, assented to by one E. N. Hill, as attorney for plaintiffs in error. (See Rules X. and XII., Record, pp. 4, 5, 23.)

June 21, 1897, a jury was impaneled, and on that day E. N. Hill, who had been retained to try the case, conducted the case as attorney for the plaintiffs in error. (Record, p. 3.)

June 25, 1897, the jury returned a verdict for the plaintiff below, and on June 26, 1897, E. N. Hill first entered his appearance formally as attorney of record and moved for a new trial. (Record, pp. 24, 56.)

July 31, 1897, exceptions were filed by Spellman and allowed (Record, pp. 25–53, 56). One of the exceptions saved was a general one "that the action could not be maintained" (Record, p. 53); this exception was submitted to the Supreme Judicial Court without argument. (Record, p. 63.)

December 1, 1897, E. N. Hill withdrew as counsel of record. (Record, pp. 53, 56.)

March 6, 1899, judgment for the defendant was entered. (Record, pp. 54, 55.)

In March, 1899, judgment charging the trustees was entered up without special order of the Superior Court, and without notice to them or the defendants below. (Record, pp. 54, 56; Rule 27, Sup. Court, pp. 4, 5.)

May 12, 1899, the plaintiffs in error filed their assignment of errors in the state proceedings. (Record, pp. 8, 9.)

June 20, 1899, the plaintiffs in error, by leave of court, amended their assignment of errors by adding to them. (Record, p. 10.)

July 7, 1899, the defendant in error filed his plea and traverse, and September 8, 1899, his amendment. (Record, pp. 11–13.)

Later there was a hearing before a single justice to establish the facts alleged in traverse by the defendant in error (Record, pp. 2–4), after which the cause was heard by the Supreme

Judicial Court of Massachusetts, and on May 15, 1900, a rescript was sent to the Superior Court affirming the judgment. (Record, p. 59.)

June 26, 1900, this writ of error was sued out and allowed by the Chief Justice of the Superior Court of Massachusetts (Record, p. 66), and on July 18, 1900, was filed with the clerk of this court. (Record, p. 69.)

Jurisdiction.

A writ of error is a continuation of the original suit.

Cohens *v.* Va., 6 Wheat. 264, 410, 411.
Clark *v.* Mathewson, 12 Pet. 164, 170.
Nations *v.* Johnson, 24 How. 195. 204, 205.

Affirmance is not a new judgment, but merely directs the judgment already given to be executed.

Schwab *v.* Berggren, 143 U.S. 442.
Fielden *v.* Ills., 143 U.S. 452.

In Massachusetts actions at law may be reviewed on the law either by exceptions or by writ of error.

P. S. Mass., chap. 187, sects. 1–15. See Appendix A.
P. S. Mass., chap. 153, sect. 8. See Appendix B.

A right to exceptions does not limit or avoid the right to review the law by writ of error.

Hemenway *v.* Hicks, 4 Pick., 497.
Peck *v.* Hapgood, 10 Met. 172, 175.
Elder *v.* Dwight, 4 Gray, 201, 204.

This right is fully recognized by the Supreme Judicial Court of Massachusetts in the proceedings and opinion in this case, and it is well established that in Massachusetts courts, under the writ, new matter may be given at the hearing before the single justice as facts to support or defeat the judgment of the lower court.

Bodurtha *v.* Goodrich, 3 Gray, 508.
Bailey *v.* Edmonson, 168 Mass. 297.
Conto *v.* Silvia, 170 Mass. 152.

The Supreme Court of Massachusetts, having considered the questions involved as properly before them and passed upon them, the defendant in error cannot be heard to allege that such questions were not raised in time.

Sully *v.* Am. National Bank, 178 U.S. 289, 298.

This Court has held that a federal question was raised in time when first raised in a petition in error to the State Supreme Court.

Arrowsmith *v.* Harmoning, 118 U.S. 194, 195.

And that under the provisions of section 709 R.S. it is not necessary that federal questions of the first two classes should be specifically set up and claimed if they appear in the record and their determination was necessarily involved in the case.

Water Power Co. *v.* St. Ry. Co., 172 U.S. 475, 487.

And that "if a federal question is fairly presented in the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids

all reference to it is as much against the right within the meaning of section 709 R.S. as if it had been specifically referred to and the right directly refused."

Chapman *v.* Goodnow, 123 U.S. 540, 548.

This Court has taken judicial notice that in Massachusetts the record remains with the Superior Court, the highest court after pronouncing its judgment returning the record to it.

Atherton *v.* Fowler, 91 U.S. 143, 146.

And this Court by Mr. Justice Gray in McDonald *v.* Massachusetts, 180 U.S. 311, has just affirmed as correct a procedure exactly similar to that taken in this case.

The cases cited by the defendant in error on page 3 of his brief are all of them excellent authorities for the proposition that errors raised in a petition for a rehearing are raised too late if the rehearing is denied; here there was no petition for a rehearing. In Massachusetts the writ of error is a writ of right for correcting error apparent in the record. The giving of a *supersedeas* bond is optional in both state and federal practice. The plaintiffs in error gave bond for the costs, as required by federal law (Record, p. 67), and the defendant in error holds a bond to dissolve attachment (Record, p. 57) on which suit is now pending.

The rule is well established that there can be no averment in pleading against the validity of a record.

Biddle *v.* Wilkins, 1 Pet. 686, 692.

"The record imports absolute verity . . . and when the Court, which in addition may be supposed to hawe personal knowledge of the fact, sustains the recital in the record as against the statement in the affidavit, its ruling cannot on review be adjudged erroneous."

Evans *v.* Stellnisch, 149 U.S. 605, 607.

See also opinion of this Court in McDonald *v.* Mass., 180 U.S. 311, 312, where Mr. Justice Gray says, after noting a trial in the Superior Court: "The defendant sued out a writ of error from the Supreme Judicial Court of Massachusetts, which affirmed the judgment, 173 Mass. 322. He then sued out this writ of error from this Court to the Superior Court, in which the record remains."

And it is said in Hudgins *v.* Kemp, 18 How. 530, 534: "Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record, as certified and returned by the clerk of the Circuit Court, can be received here to impeach its verity."

The clerk of the Superior Court certifies that he has the record set out in his return to the writ of error to this Court, and the defendant in error cannot be heard to dispute any part of it.

It is submitted that this Court has jurisdiction of the case.

Murray *v.* Charleston, 96 U.S. 432, 442.
Myrick *v.* Thompson, 99 U.S. 291, 294.
Hartman *v.* Greenhow, 102 U.S. 672, 676.

Answer to Motion to Affirm.

The defendant in error misapprehends the limits that this Court has often laid down in its decisions on writs of error from state courts; the plaintiffs in error do not assume to review here a single finding of fact in either the Superior or Supreme Court of Massachusetts, except as those facts found depend upon an erroneous construction of the law.

Worthen *v.* Cleveland, 129 Mass. 570.

They now ask to be heard on the law, and, while it may seem frivolous to the defendant in error, the plaintiffs in error respectfully ask that the merits be considered.

Where on the facts appearing in the record no amount of proof could obviate the objections to the judgment the Court will reverse the judgment whether the specific objection was raised in the trial court or not.

Slater *v.* Rawson, 1 Met. 450, 457.
Bond *v.* Bond, 7 Allen, 1, 6.
Comm. *v.* Meserve, 154 Mass. 64, 75.
Lyon *v.* Prouty, 154 Mass. 488, 490.
Brick *v.* Bosworth, 162 Mass. 334, 336.

The record shows (pp. 53, 63) that a general exception was taken before the trial court to the sufficiency of the cause of action, and while not argued it was not abandoned at the hearing before the Supreme Judicial Court.

That this general exception raises the federal questions involved and necessary to determination of the cause, see the record in this Court in McClellan *v.* Chipman, No. 252, October term, 1894 (p. 25), and the decision of this Court that the federal question was raised therein.

McClellan *v.* Chipman, 164 U.S. 347.

The only ground on which this Court is asked to affirm the judgment below is that the errors assigned are frivolous; the plaintiffs in error are perfectly willing to submit their case on this motion of the defendants in error.

First Assignment.

"That in said suit there was drawn in question the validity of an authority exercised under said state of Massachusetts as being repugnant to article 1 of the fourteenth amendment to the constitution of the United States, which was specially set up and claimed, in that these defendants were deprived of their

property without due process of law, and the decision was in favor of the validity of the authority drawn in question."

This error was brought to the attention of the Superior Court by exception (Record, p. 53, line 15), and was before the Supreme Judicial Court without argument (Record, p. 63), and in assignments 1, 2, 3, 4, 5, 6, 10, and 11 in the writ of error to the Supreme Judicial Court. (Record, pp. 8, 9.)

A.

As was said in the brief of the plaintiffs in error filed in the Supreme Judicial Court of Massachusetts: "The record shows that the judgment in the court below could not have been rendered except by the court sustaining the validity of certain of the Public Statutes of Massachusetts, — viz., chapter 164, relating to absent defendants; chapter 183, relating to the trustee process; and chapter 157, relating to insolvency, — in their interference with the constitutional rights of the plaintiffs in error, as non-residents, to contract with the citizens of this state." (Appendixes C, D, E.)

The Supreme Judicial Court of Massachusetts, in its opinion, substantially held that the proceedings were irregular in some features, but that the record was sufficient to support the judgment, and the plaintiffs in error raise the question whether those proceedings below are sufficient to constitute due process of law.

In order to give jurisdiction there must be a court with power to hear and determine the cause, a plaintiff, and a defendant duly served or appearing, or a valid attachment of property of the defendant.

The action at first gave no notice to anyone that the insolvent law of the state was involved, except the statement of the capacity of the plaintiff, but that statement was not significant of a local action to rescind a contract under a local law. Service was not made on the defendants; no continuance was asked for by the plaintiff below and granted by the Court as required by the state law; and the plaintiffs in error contend that there was no valid attachment, and that therefore the action failed with the end of the return term of the writ and could not be

revived; and that this was not an amendable or formal error, but went to the root of the jurisdiction of the Court to hear and determine the cause, and that the error might be called to the attention of the Court at any time to arrest or reverse the judgment.

B.

A decision of a state court that its proceedings or the provisions of a statute constitute "due process of law" is not decisive upon this Court.

Hallinger *v.* Davis, 146 U.S. 314, 320.

Nor are they decisive in any case in which the contention turns upon general rather than strictly local law.

Swift *v.* Tyson, 16 Pet. 1, affirmed.
B. & O. R.R. *v.* Baugh, 149 U.S. 368, 371.

The prohibitions of the fourteenth amendment "refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities."

Blake *v.* McClung, 172 U.S. 239, 260.
C. B. & Q. R.R. *v.* Chicago, 166 U.S. 226.

The powers of such instrumentalities "cannot be exercised with the effect of defeating or impairing rights secured to citizens of the several states by the supreme law of the land."

Blake *v.* McClung, *supra*, p. 254.

A state insolvency law cannot be given extra-territorial effect; if it is construed to interfere with the contracts of non-residents, it is unconstitutional and void.

"When in the exercise of that power the states pass beyond their own limits and the rights of their own citizens and act upon the rights of citizens of other states, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states and with the constitution of the United States."

Ogden *v.* Saunders, 12 Wheat. 213, 369.

"Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation."

Baldwin *v.* Hale, 1 Wall., 223, 234.

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Norton *v.* Shelby County, 118 U.S. 425-442.

In Graves *v.* Neal (57 F. R. 816), Judge Putnam in the First Circuit, while assuming that a similar action under Minnesota law was transitory and under the decision of this Court in Huntington *v.* Attrill (146 U.S. 675) enforceable wherever the defendant could be served, yet suggested that if the goods were removed from Minnesota before the appointment of an assignee the right of action might never vest, and on this point the plaintifls in error cite the decision of this Court in King *v.* Cross (175 U.S. 396), that under the Massachusetts law the bankrupt's title to his property is not divested until the first publication of notice, and as the goods forming the subject of this action were removed from Massachusetts December 20, 1895

(Record, pp. 39, 40), while the publication was after January 7, 1896 (Record, p. 25), no right of action vested in the assignee, the defendant in error.

But in this case the right of action is dependent on an *intent* to evade the law, etc. (Appendix E), yet neither of the plaintiffs in error knew anything of the transaction until after the goods were in New York state and out of the jurisdiction of Massachusetts. (Record, pp. 35, 38, 40.)

As set out in the brief below, "the plaintiffs in error, as citizens of the state of New York, had a legal right to contract with McKeon, and having become his creditors they had a legal right to receive payment for the debt, either in cash or by purchase of merchandise and a set-off, or to receive a consignment of goods as an hypothecation or otherwise, and thereafter to deal with them under the laws of the state of New York. This right they could not be deprived of at any time by the law of Massachusetts. The most that the state insolvency law could do was to take possession of the insolvent's estate and deprive the plaintiffs in error of the remedy of preliminary attachment; all other rights of suit and execution were preserved to them by the constitution of the United States. Until the Insolvency Court took possession of the insolvent's estate the plaintiffs in error had a constitutional right to receive any portion of it in payment of his debt or as security, and the provision of the Massachusetts Insolvency Act, providing that an assignee in insolvency may avoid a contract made by the bankrupt within six months prior to his adjudication as insolvent, and providing a penalty for receiving a payment or security amounting to a preference, is inoperative as to these non-residents, plaintiffs in error.

"If the law is construed to be applicable to these non-residents, then these provisions are abridgments of rights, privileges, and immunities guaranteed by the fourteenth amendment to the constitution of the United States; and, if these provisions are not applicable to them, then the judgment of the Superior Court is erroneous and deprives them of their property without due process of law, contrary to the fourteenth amendment.

"Gilman *v.* Lockwood, 4 Wall. 409.
Ogden *v.* Saunders, 12 Wheat. 213.
Pennoyer *v.* Neff, 95 U.S. 714.
Savoye *v.* Marsh, 10 Met. 594, 595.
Baldwin *v.* Hale, 1 Wall. 223, 234.

"The plaintiffs in error submit that as the record shows (pp. 35, 40) they were not at any time within the jurisdiction of Massachusetts when the acts set out in the declaration of the plaintiff below took place; that they cannot, as a matter of law, be held to have had any intent to defeat the insolvency laws of Massachusetts, they owed no allegiance to the laws of Massachusetts, they were not bound to know them, and they could not commit an offence against them by an act committed in or a purpose held while residing in New York, and the judgment of the Superior Court is therefore erroneous as a matter of law.

"Further, an action for a penalty is not such a 'personal action'—that is, transitory—as may be brought against an absent defendant under Public Statutes, chapter 164. A penalty means punishment, and involves jurisdiction over the culprit before it can be inflicted.

"Galpin *v.* Page, 18 Wallace, 350.
Freeman *v.* Alderson, 119 U.S. 185, 188."

The fact that an agent of the defendants below was in the state of Massachusetts cannot be imputed to them to show an intent; the only cases found to that effect are where all the parties were bound by the law: in this case the plaintiffs in error owed no allegiance to the law.

Sage *v.* Wynkoop, F. C. 12,215.
Vogel *v.* Lathrop, F. C. 16,985.
Mayer *v.* Herman, F. C. 9,344.
Graham *v.* Stark, F. C. 5,676.
Wright *v.* Muxlow F. C. 17,629.
Sartwell *v.* North, 151 Mass. 142, 146.
Bush *v.* Moore, 133 Mass. 198.
Rogers *v.* Palmer, 102 U.S. 263.

The construction of a state law by the highest court of a state binds this Court as to what that law means, and the constitutionality of the law is determined by such construction.

Wood *v.* Brady, 150 U.S. 18.
Allgeyer *v.* La., 165 U.S. 578.
R.R. Co. *v.* Texas, 177 U.S. 66.
Los Angeles *v.* Water Co., 177 U.S. 558.

The law of Massachusetts involved being a nullity so far as non-residents' obligations to it are concerned, proceedings founded upon it do not constitute due process of law, are fatally defective, and the question may be raised at any time.

Capron *v.* Van Noorden, 2 Cranch. 126.
Striker *v.* Mott, 6 Wend. 465.
Windsor *v.* McVeigh, 93 U.S. 274, 282.
Voorhees *v.* U.S. Bank, 10 Pet. 473.
U.S. *v.* Arredondo, 6 Pet. 709.
Cooper *v.* Reynolds, 10 Wall. 308, 316.
Ex parte Lange, 18 Wall. 163.

Waiver cannot cure such proceedings.

Chase *v.* Palmer, 25 Me. 341, 345.
Atty. Gen. *v.* Moliter, 26 Mich. 444, 448.
U. P. R.R. *v.* Ogilvie, 18 Neb. 639, 640.
Collins *v.* Keller, 58 N. J. L. 429, 430.
Musselmans Ap., 101 Pa. St. 169, 171.
Trustees *v.* Stocker, 13 Vroom, 115, 116.
Whitelmist *v.* Pettipher, 105 N.C. 40.
Lamson *v.* Worcester, 58 Vt. 381, 388.
Poindexter *v.* Burwell, 82 Va. 507, 512.
Carlisle *v.* Weston, 21 Pick. 535, 536.
Osgood *v.* Thurston, 23 Pick. 110, 111.
Mastick *v.* Sup. Ct., 94 Cal. 347, 350.

Tootle *v.* French, 2 Idaho, 746.
Way *v.* Way, 64 Ills. 406, 410.
Richards *v.* L. S. & M. S. Ry., 124 Ills. 516, 519.
R.R. Co. *v.* Sutton, 130 Ind. 405.
McCoy *v.* Able, 131 Ind. 419, 420.
Orcott *v.* Hanson, 71 Ia. 514.
In re Grogan, 13 Misc. R. 363 (N.Y. Surrogate).

Where by reason of a federal law the state court has no jurisdiction of the cause of action, jurisdiction cannot be given by waiver or filing a bond. It is a case of want of jurisdiction of the subject matter.

Hamilton *v.* Merrill, 37 Ohio St. 682, 684.

The cause of action must arise under laws which bound the defendants below. This principle is established in the reasoning of this Court on the exceptions of D'Arcy, in

D'Arcy *v.* Ketcham, 11 How. 165.

Notice and hearing alone do not constitute due process of law.

C. B. & Q. R.R. *v.* Chicago, 166 U.S. 226.

C.

The authority of a court to proceed in a suit begun by attachment is well established, and the action will support a personal judgment if the defendant comes in and litigates.

Mayhew *v.* Thacher, 6 Wheat. 129.
Pennoyer *v.* Neff, 95 U.S. 714, 725.

If there was no valid attachment and no appearance, service, or continuance, the action was discontinued by operation of law on the return day, or at most with the return term.

Riggs *v.* Chester, 2 Cranch. C.C. 637.
Cooper *v.* Reynolds, 10 Wall. 308, 318.
Freeman *v.* Alderson, 119 U.S. 185, 188.

At the time the writ was returned into court the only attachment that had been made was by trusteeing debts contracted and payable in New York. (Record, pp. 15, 4.)

These debts were not subject to the trustee process of the state of Massachusetts.

Wabash R.R. *v.* Tourville, 179 U.S. 322, 327.

It is submitted that a state can only separate the situs of a credit from a non-resident owner when the debt is either contracted or payable in the state where the garnishment is made.

The Massachusetts decision is in flat contradiction of the opinion of this Court in R.R. *v.* Tourville, *supra*.

Sturtevant *v.* Robinson, 18 Pick. 175.

It is clearly required by public policy that a creditor's debt shall not be ambulatory with the debtor, the policy of Congress has been to require suits to be brought in the district of the defendant, and the decisions of this Court are uniform that he can only be sued *in personam* in a state where he is found. Without the distinction established by this Court, in R. R *v.*. Tourville, *supra*, is enforced, a State of Maine debtor traveling to California may there be compelled to answer in a garnishee proceeding, and judgment against a New York principal defendant be obtained after publication and without actual knowledge of the suit on his part; or, if notified, he may be compelled to appear and defend at great expense and disadvantage.

This Court used sweeping language in Ogden *v.* Saunders, 12 Wheat. 213, 367: "The constitution has produced such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the states unquestionably possess over their own contracts and their own citizens.

"The reason is that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in that sphere in which it is sovereign, — that is, between its own citizens, between suitors subjected to state power exclusively, in their controversies between themselves."

In this case at bar the contract was made, executed on one side by the shipment of merchandise, and to be executed by the other side by payment in New York; and it is submitted that the situs of the debt was out of Massachusetts, so that it could not be trusteed.

If there was no valid attachment, and no service or appearance at the return term of the writ, the action became discontinued under the writ, and all subsequent proceedings were a nullity; the life of the writ could not be thereafter extended.

Jacobs Fisher's Digest, p. 10,535.
Fisher *v.* Cox, 16 L.T.N.S. 397.

D.

A plaintiff cannot have judgment for any other cause of action against a non-resident defendant than that stated in the attachment or in the publication.

Janney *v.* Spedden, 38 Mo. 395.

The writ shows an action in contract or tort (Record, p. 14); the declaration shows an action for goods delivered (Record, p. 16); the publication shows an action in contract or tort

(Record, p. 20); and, although no return of service by publication was ever made, the defendants appeared on this statement, which must certainly mean that the action they were summoned in on was a transitory action, enforceable against them wherever they could be found. An attorney was retained to defend the action brought (Record, p. 21); after this the cause of action was changed to one for impairing, hindering, impeding, and evading the insolvency law of Massachusetts (Record, p. 22) (see Appendix E), and for a fraud on the insolvency law of Massachusetts. (Record, p. 23.)

On the face of the record these amendments changed the action from a transitory to a local one, and were not authorized by the defendants. (Record, p. 4.)

"Whether an amendment will relate back to the commencement of the suit, or operate only from its date, must depend upon whether it merely cures a defect in the original proceedings, or is in substance the commencement of new litigation."

Burgie *v.* Sparks, 11 Lea, 84, 88.

Clearly these amendments introduced a new cause of action, the declaration as filed was complete and sufficient for a recovery in contract for the value of the goods alleged to have been delivered, the amendments introduced a new cause of action, — viz., the fraudulent intent to impair, hinder, impede, and evade the insolvency laws of Massachusetts. (See Appendix E.)

E.

It is submitted that an action to recover a preference under the insolvency law of Massachusetts is not a transitory action within the definition in Huntington *v.* Attrill. Although not a criminal law, offences against it are punishable by imprisonment if committed after a petition is filed (P. S. Mass., chap. 157, sect. 119, and chap. 216, sect. 103), or by forfeiture of discharge or property if committed before the petition is filed (chap. 157, sects. 93 to 95, and sects. 33, 96, and 98).

The gist of the offence is not a fraud upon any individual, for at common law there is none, but a fraud and evasion of the statute (sects. 96 and 98, Appendix E).

The offence when committed cannot be availed of by a creditor, but must be prosecuted by an officer of the court holding title under the statute, and the forfeiture, while it may inure to the creditors, is not to them.

It is submitted that the action is penal and not contractual, "a pecuniary forfeiture inflicted for committing some specified offence."

3 Stephens Comm. 535.
U. S. *v.* Choteau, 102 U.S. 603, 611.

There being no authority at common law for the use of the trustee process for commencing an action for infringing a penal statute, it appears to be clearly an infringement of a right, privilege, or immunity secured to non-residents by the fourteenth amendment to the constitution.

F.

The first count was a count in contract, the second and third counts were for offences against the laws of Massachusetts, by reason of which offences, if proved, the plaintiff below was entitled to recover, but not otherwise; the verdict was a general one, and the Court cannot gather from it anything more than guessing grounds as to what count the jury found on; they could not find under all three, and none of the counts were discontinued. If the verdict was under the first count the defendant below must pay $7,071.63 and interest and costs; if under the second or third counts the defendants must pay that sum and forfeit their dividend on $3,865.25.

P. S. Mass., chap. 157, sect. 33 (Appendix E).

It being uncertain upon what ground the verdict was found, the plaintiffs in error submit that the proceedings do not constitute due process of law, and that they are void under the provisions of the fourteenth amendment to the constitution of the United States.

Rindge *v.* Green, 52 Vt. 204, 209.
Steen *v.* Norton, 45 Wis. 412.
Holmes *v.* Doane, 9 Cush. 135, 140.
Whiting *v.* Cook, 8 Allen, 63, 64.
York *v.* Johnson, 116 Mass. 482.
Peterson *v.* Patrick, 126 Mass. 395.
Clapp *v.* Campbell, 124 Mass. 198.

The Supreme Court of Massachusetts has recently held to the common-law rule in this respect.

Kilberg *v.* Berry, 166 Mass. 488.

This Court has recently held that, in order to have the proceedings in a state court held due process of law, they must be founded upon reasonable rules or laws, and that the reasonableness of those rules or statutes is a matter for the determination of this Court upon the facts.

Iowa Cent. Ry. *v.* Iowa, 160 U.S. 389, 393.
Roller *v.* Holly, 176 U.S. 398, 413.

In the last case, the point on which the case turned was the reasonableness of the time limit in the notice given; but on the principle involved the plaintiffs in error submit that this Court will scrutinize the record of the proceedings below, not to ascertain whether the questions of practice or fact were correctly determined, but whether the record discloses proceedings sufficient to constitute due process of law, and that in determining

that question the common-law decisions of this Court will control if unchanged by state statute.

Certainly it cannot be said of this case, as was said by this Court in Hallinger *v.* Davis, 146 U.S. 314, 324, "The trial seems to have been conducted in strict accordance with the forms prescribed by the constitution and laws of the state, and with special regard for the rights of the accused thereunder."

G.

Construction of court that a general retainer of counsel authorized counsel to allow amendments.

The former decisions of the Supreme Judicial Court of Massachusetts are that an attorney by virtue of his employment can only prosecute or defend the cause of action for which he was retained.

Moulton *v.* Bowker, 115 Mass. 36.
Sartwell *v.* North, 144 Mass. 188.

The decision in this case is that the attorney had a power formerly denied. This later decision cannot enlarge the attorney's power in this case beyond its former construction.

Gelpcke *v.* Dubuque, 1 Wall. 175.

If the attorneys did not have the power to allow these amendments without the knowledge and consent of the defendants below, the proceedings cannot be called due process of law.

The lack of authority may be set up after a trial upon the merits.

Wright *v.* Andrews, 130 Mass. 149, 150.
Graham *v.* Spencer, 14 F.R. 603, 607.

H.

This Court has repeatedly held that state insolvency laws can have no extra-territorial effect.

Ogden *v.* Saunders, 12 Wheat. 213.
Sturgis *v.* Crowninshield, 4 Wheat. 122.

Hence the assumed authority of the assignee in insolvency to avoid executed contracts between the insolvent when in New York before any insolvency proceedings were begun and these non-resident plaintiffs in error, and to recover back the goods or their value, is repugnant to the constitution of the United States and void; and, as all these proceedings in the state courts depended on the validity of that authority, they do not constitute due process of law, and the decision of the state court sustaining the assignee's rights to sue is a construction of his authority (chap. 157 Mass. P.S.), and is repugnant to the fourteenth amendment to the constitution of the United States, and the judgment should be reversed.

Second Assignment.

"That in said suit there was drawn in question the validity of an authority exercised under the said state of Massachusetts as being repugnant to article 1, section 10, of the constitution of the United States, which was specially set up and claimed, and the decision was in favor of the validity of the authority drawn in question."

This error was called to the attention of the Superior Court by exception (Record, p. 53, line 15), and was before the Supreme Judicial Court without argument (Record, p. 63), and in assignments 2, 8, and 16 in the writ of error to the Supreme Judicial Court (Record, pp. 8, 10).

A.

The plaintiffs in error challenge the authority of the courts of Massachusetts to impair the obligation of a contract made outside of the state with a non-resident and to be performed outside of the state of Massachusetts, or by a judicial decision to enlarge the contract of employment they made with their attorneys, or to appoint an assignee in insolvency with authority to annul contracts by the insolvent with non-residents or to annul the judgments of courts of sister states.

They repeat here a portion of their brief filed with the Supreme Judicial Court of Massachusetts:

"The construction which must be given to the insolvency law of Massachusetts to support the judgment of the Superior Court is repugnant to article 1, section 10, of the constitution of the United States, relating to the impairment of the obligation of contract, which is set out as the sixteenth assignment of error.

"The plaintiffs in error, citizens of the state of New York, entered into a contract with McKeon; the delivery on the contract was made by the plaintiffs in error in New York, and the payment by McKeon was to be made in New York; the same is true of the contracts with the trustees.

"The operation of the law, as necessarily construed by the Superior Court in order to support the verdict and the judgment, impaired the obligation of contract in the following substantial particulars: —

"(*a*) It deprived the plaintiffs in error of their right to receive payment or satisfaction under their contract with McKeon.

"(*b*) It gave a third party, not in existence or contemplation at the time that the contract was made, the right to avoid the contract whereby merchandise was given by McKeon to the plaintiffs in error as security on a contract to be performed.

"(*c*) It avoided the contract made by the plaintiffs in error with McKeon in New York whereby the title to the merchandise was revested in him.

"(*d*) It impaired the obligations of the trustees' contract with the plaintiffs in error, whereby their debts were payable in New York.

"(c) It impaired the obligations of the contract of the plaintiffs in error with the trustees by assigning to the defendant in error the said contract and the plaintiffs in error right of action thereon without their consent and without jurisdiction over them to compel such assignment.

"'A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. Any law which releases a part of this obligation must, in the literal sense of the word, impair it.'

"Sturgis v. Crowninshield, 4 Wheat. 122, 197, 200, 203.
Ogden v. Saunders, 12 Wheat. 213.
Gilman v. Lockwood, 4 Wall. 409.
Baldwin v. Hale, 1 Wall. 223.
Watson v. Bourne, 10 Mass. 337.

"The theory upon which the process of foreign attachment is founded is, that a state has a right to seize the property of non-residents within its borders to pay debts due its citizens.

"It is submitted that a contract to pay money in another state is not property, but is a contract protected under the constitution of the United States, and that a state cannot interfere with its terms except it has jurisdiction over both parties. Further, an action by an assignee in insolvency, for an alleged preference, is not an action for a debt due to a citizen of the state. The assignee frequently being, and in this case as shown by record, a representative of non-residents as well as of citizens.

"The plaintiffs in error rest upon the broad ground that the state of Massachusetts could not impair McKeon's obligation to pay them; that a law imposing on them, being non-residents of the state, a penalty for collecting their debt is repugnant to article 1, section 10, of the constitution of the United States, and that a law allowing an assignee in insolvency to avoid or vary that contract is equally void. The property in dispute was removed from the limits of the state of Massachusetts before the proceedings of the Insolvency Court began, and before the Court

had taken possession of the insolvent's estate, and that terminated the jurisdiction of Massachusetts over it to arrest it or its proceeds for the benefit of creditors."

. . . "The contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state, under the circumstances of this case, and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no power to prevent, at least with reference to the federal constitution. To deprive the citizen of such a right as herein described, without due process of law, is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal constitution the defendant had a right to perform. This does not in any way interfere with the acknowledged rights of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such rights, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the federal constitution."

Allgeyer, v. La. 165 U.S. 578, 591.

The insolvency law as construed does not hold that the transactions between the plaintiffs in error and McKeon were void, but only voidable.

Burt v. Perkins, 9 Gray, 317, 320.
Snow v. Lane, 2 Allen, 18.

If the transaction was not absolutely void, so that no title could pass, then the state of Massachusetts could not appoint an officer and give him authority to avoid the title acquired by a non-resident.

B.

The common-law decisions of a state court are not rules of decision for a federal court.

Neither a statute nor a changed judicial construction of it or of the common law can be retroactive so as to increase the liability or scope or to diminish the rights under a contract entered into prior to it.

Gelpcke *v.* Dubuque, 1 Wall. 175, 206.

By the prior decisions of the Supreme Court of Massachusetts an attorney-at-law had not, by reason of his employment, authority to act for his principal, except in the cause for which he was retained; he could control the remedy, but could not prosecute or defend a suit for another cause.

Moulton *v.* Bowker, 115 Mass. 36.
Sartwell *v.* North, 144 Mass. 188.

The decision of the Supreme Court of Massachusetts that the attorneys in this case had authority, by reason of their employment, to change the cause of action is therefore repugnant to article 1, section 10, of the constitution of the United States.

C.

This assignment raises the authority of the Superior Court to interfere by the trustee process (chap. 183, P. S. Mass., Appendix D) with a contract with a non-resident made and payable outside of the state; and also the authority of the Court of Insolvency of Massachusetts under chap. 157, P. S. Mass., to appoint an officer with authority under the local law of Massachusetts to avoid contracts of an insolvent made in another state, and to recover the consideration paid the non-resident.

The Supreme Court of Massachusetts has decided that such contracts are subject to the local law relating to trustee process.

Sturtevant *v.* Robinson, 18 Pick. 175.

The Supreme Court of the United States has decided that they are not.

Wabash R.R. *v.* Tourville, 174 U.S. 322.

The principle supporting the federal decision is clearly set out by Massachusetts courts in other cases.

It is submitted that the authority assumed by the state court to change the party and the place of performance without the consent of the non-resident other party is an impairment of the obligations of contracts, and is repugnant to article 1, section 10, of the constitution of the United States.

Ogden *v.* Saunders, 12 Wheat. 213.
Sturgis *v.* Crowninshield, 4 Wheat. 122.
State Tax on Foreign Held Bonds, 15 Wall. 300, 320.

"The trustee process operates as a species of compulsory statute assignment.

"Strong *v.* Smith, 1 Met. 476.
McCarthy *v.* Propeller, 4 F. R. 818.
A. & P. R.R. Co. *v.* Hopkins, 94 U.S. 13.

"A discharge of that nature can only operate where the law is made by authority, common to the creditor and debtor, in all respects, where both are citizens or subjects.

"Watson *v.* Bourne, 10 Mass. 337.
Baker *v.* Wheaton, 5 Mass. 509.

"The right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a state which is not the state of the contract."

Ogden *v.* Saunders, 12 Wheat. 213, 365.

THIRD ASSIGNMENT.

"That in said suit there was drawn in question the validity of a statute of the state of Massachusetts, to wit, chapter 157 of the Public Statutes of Massachusetts, on the ground of its being repugnant, as construed to article 1, section 10, of the constitution of the United States, which was specially set up and claimed, and the decision was in favor of the validity of said statute of Massachusetts as construed."

This error was called to the attention of the Superior Court by exception (Record, p. 53, line 15), and was before the Supreme Judicial Court without argument (Record, p. 63), and in Assignment 16 of the writ of error to the Supreme Judicial Court. (Record, p. 10.)

The third assignment involves the validity of chap. 157, P. S. Mass., being the Insolvent Law of Massachusetts.

It is submitted that this law is void so far as by construction of the Supreme Court of the state it seeks to draw to it the contracts of non-residents who do not voluntarily appear in the Insolvency Court and submit to its jurisdiction; and so far as it seeks by sects. 97 and 99 (Appendix E) to hold non-residents liable to its penalties for collecting or securing the money due them from insolvent citizens of Massachusetts.

Such provisions, it is submitted, are repugnant to article 1, section 10, of the constitution of the United States.

Sturgis *v.* Crowninshield, 4 Wheat. 122.
Ogden *v.* Saunders, 12 Wheat. 213.
Gilman *v.* Lockwood, 4 Wall. 409.
Baldwin *v.* Hale, 1 Wall. 223, 234.
Savoye *v.* Marsh, 10 Met. 594, 595.
Pennoyer *v.* Neff, 95 U.S. 714, 720.

The principles and decisions are discussed somewhat in the first assignment of error. If the law as construed is invalid, then the authority exercised under it is unconstitutional and the procedure attempting to enforce it against a non-resident is not due process of law and all proceedings under it are a nullity.

Norton *v.* Shelby County, 118 U.S. 425, 442.

Fourth Assignment.

"That in said suit there was drawn in question the validity of statutes of the state of Massachusetts, — to wit, chaps. 164 and 183 of the Public Statutes of Massachusetts, — on the ground of their being repugnant, as construed, to article 1 of the fourteenth amendment to the constitution of the United States; which was specially set up and claimed in that, as enforced, it deprived these non-resident plaintiffs in error of their property without due process of law, and the decision was in favor of the validity of said statute of Massachusetts as construed."

This error was called to the attention of the Superior Court by exception (Record, p. 53, line 15), and was before the Supreme Judicial Court without argument (Record, p. 63), and in assignments 1, 2, 3, 4, 10, and 11 in the writ of error to the Supreme Judicial Court (Record, pp. 8, 9).

A.

The fourth assignment involves the validity of chap. 183, P.S. Mass. (Appendix D), relating to actions begun by trustee process as affected by chap. 164, P.S. Mass. (Appendix C), relating to actions against absent defendants, and as construed by the Supreme Court of Massachusetts. The plaintiffs in error submit that as construed they do not constitute due process of law as required by the fourteenth amendment to the constitution of the United States.

The construction given by the Supreme Court of Massachusetts is involved in the decision that a debt contracted and

payable in another state may be trusteed in Massachusetts. The Supreme Court of the United States has decided that this cannot be done.

Wabash R.R. *v.* Tourville, 179 U.S. 322.

If these debts were not trusteeable, as there was no service on the plaintiffs in error, nor any continuance for further service as specifically required by P.S. chap. 164, sect. 6 (Appendix C), and the docket does not show such continuance (Record, p. 60), then the writ died with the return term which ended the Saturday preceding the second Monday of June, and the Court had no jurisdiction.

P.S. Mass., chap. 152, sect. 17.
Acts 1885, chap. 384, sect 4.
P.S. Mass., chap. 164, sect. 6.
Fisher *v.* Cox, 16 L.T.N.S. 397.
Wilson, Pet'r, 131 U.S. 182.
Cooper *v.* Reynolds, 10 Wall. 308, 318.
Burlingame *v.* Cole, 13 Gray, 271.
Steen *v.* Norton, 45 Wis. 412.
Rindge *v.* Green, 52 Vt. 204, 209.
Lockett *v.* Rumbaugh, 45 F.R. 23.
Galpin *v.* Page, 18 Wall. 350.

As proceedings against absent defendants are on the borderland of excess of power, all requirements of the statute must be strictly followed, and it is not competent for a court of a state to waive in favor of its citizens any provision adopted for the benefit of a non-resident. If the plaintiff below did not comply with the statute it is his fault, and he cannot invoke an unconstitutional construction of the law in order to save himself from the result of his own neglect.

Thatcher *v.* Powell, 6 Wheat. 119, 127.
Lockett *v.* Rumbaugh, 45 F.R. 23.
Ogden *v.* Saunders, 12 Wheat. 213, 369.
Halsey *v.* Hurd, 6 McLean, 14.
Rindge *v.* Green, 52 Vt. 204, 209.
Steen *v.* Norton, 45 Wis. 412.

A discontinuance in the pleadings operates in law as a dismissal without a formal entry.

Encycl. Pl. & Pr., vol. 6, p. 961.

This is particularly true in actions under penal statutes.
Fisher *v.* McGirr, 1 Gray, 1, 35, 36.

B.

Further, it is urged that chap. 183 P.S. Mass. (Appendix D), as construed by the Supreme Court of Massachusetts, is void, as contravening the fourteenth amendment to the constitution of the United States, in that it assumes to bring in absent defendants charged with violating its local laws and subjecting their property to forfeiture under those laws.

All these propositions involve the common-law rights of non-residents, which cannot be taken away by local legislation, and in construing these rights the federal courts are not bound by state decisions.

Blake *v.* McClung, 172 U.S. 239.

The language of sects. 96 and 98 of chap. 157, P.S. Mass. (Appendix E), clearly defines the nature of the action authorized. No recovery can be had or forfeiture of share in estate be enforced except the defendant had an "intent" to evade, hinder, or impair the law, or to perpetrate a fraud on the law.

"Where the property neither does nor forbears doing anything, but the forfeiture is a mere penalty for an intent which reposes in the mind of its owner, then the question is one of criminal law."

Bishop on Criminal Law, sect. 703.

"The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal proceeding."

U. S. *v.* Choteau, 102 U.S. 603, 611.
Chaffee *v.* U. S., 18 Wall. 530, 538.

Massachusetts laws recognize that actions for forfeitures are local and not transitory.

P.S. Mass., chap. 161, sect. 11 (Appendix F).

A penalty means punishment, and involves jurisdiction over the culprit when the act was committed and over his body before it can be inflicted.

It is doubtful whether under the same circumstances the Supreme Judicial Court of Massachusetts would hold that under the state insolvent law these plaintiffs in error could have been imprisoned for having had an intent in New York to do a thing concerning a vested right under a contract made and to be performed in New York, even though that intent and that act reduced a fund that afterwards came into the hands of its courts to be administered. If this right to imprison is doubtful, we submit that the constitution of the United States protects our property equally with our persons, and that a right cannot exist to deal with the one in this case that might not authorize dealing with the other.

U. S. *v.* Lee, 106 U.S. 196, 218.

Hence we urge —

1. That no valid garnishment was made.

2. That no action was before the Court during the return term of the writ, which consequently died beyond power to revive.

3. That the action was for a penalty.

4. That on the record the plaintiffs in error were not subject to the law imposing the penalty.

5. That an action for a penalty could not be brought against the plaintiffs in error except by personal service.

6. That the foregoing are conclusions of constitutional law upon the facts shown in the record.

7. That the law of Massachusetts, P.S., chaps. 164 and 183, being construed by its highest court contrariwise, are void and invalid under the fourteenth amendment as to these non-resident plaintiffs in error.

As was said by this Court:

"The cardinal principles of justice are immutable. . . .

"Recognizing the difficulty in defining with exactness the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice."

Holden *v.* Hardy, 169 U.S. 366, 387, 390.

And as summarized by Judge Clark after reviewing the decisions of this Court:

"State action, to which the prohibitions of the fourteenth amendment extend, is not limited to a legislative enactment as it comes from the hands of the legislature, but extends to all instrumentalities and agencies officially employed in the execution of the law down to the point where the personal and property rights of the citizen are touched."

Nashville, C. & St. L. Ry. *v.* Taylor, 86 F.R. 168, 184.

FIFTH ASSIGNMENT.

"That in said suit the Superior Court of the State of Massachusetts decided, against the contention of the plaintiffs in error,

that it would not give full faith and credit to the judicial proceedings of the Supreme Court of the state of New York, as set forth in the evidence, as required by article 4, section 1, of the constitution of the United States of America, although their attention was drawn thereto, and thereby defeated the rights of these plaintiffs in error to relief."

This error was called to the attention of the Superior Court (Record, p. 53), and was before the Supreme Judicial Court without argument (Record, p. 63); and also by the seventeenth assignment of error argued before the Supreme Judicial Court. (Record, p. 10.)

A.

As said in the brief filed in the state court:

"The record shows that the plaintiff below introduced evidence to the Superior Court showing that after the goods in question reached New York McKeon followed; that his ownership was acknowledged in that state and the title revested in him; that the courts of New York having jurisdiction of the goods both by attachment and of McKeon, the owner, by personal service, took jurisdiction of the suit of the plaintiffs in error against McKeon, tried and determined the case, and ordered the goods sold; and that the plaintiff in error obtained title to the goods, the subject matter of the suit by the defendant in error, by virtue of a purchase of them at a judicial sale of them in the city of New York, by the sheriff of the county of New York.

"As the plaintiff below introduced this evidence (Record, pp. 36, 48, 53), he cannot object that the judicial proceedings in New York were not proved by properly authenticated records. With these facts admitted by the plaintiff below, the trial court erred in allowing the case to go to the jury, and thereby failed to give full faith and credit to the judicial proceedings of New York, as required by article 4, section 1, of the constitution of the United States.

"Hampton *v.* McConnell, 3 Wheat. 234, 235.
Green *v.* Van Buskirk, 5 Wall. 307, 311.
Green *v.* Van Buskirk, 7 Wall. 139, 148.

"The evidence introduced by the plaintiff below, showing the litigation and judicial sale in New York, is a complete bar to recovery here. In the matter of the restoration of the title to the merchandise to McKeon in New York, if any crime or offence was committed it must be tried in the courts of New York; if any liabilities were created they must be determined by the law of New York.

"Buchanan *v.* Drovers Nat. Bank, 6 U.S. Ap. 566, 579.
Milliken *v.* Pratt, 125 Mass. 374.
McIntyre *v.* Parks, 3 Met. 207."

B.

A bill of exceptions is a part of the record, and questions appearing in it are before the Court.

Estes *v.* Trabue, 128 U.S. 225, 228.
B. & P. R.R. *v.* Trustees, 91 U.S. 127, 130.

"The true test is not whether a federal question was presented, but whether such a question was decided, and decided adversely to the federal right. . . . Very little importance has been attached to the inquiry whether the federal question was formally raised."

Murray *v.* Charleston, 96 U.S. 432, 442.
Water Power Co. *v.* R.R. Co., 172 U.S. 475, 487.

It appears from the opinion of the Supreme Court of Massachusetts that the plaintiffs in error insisted on their constitutional rights (Record, p. 66), and this sufficiently raises the question.

Yazoo R.R. Co. *v.* Adams, 180 U.S. 1, 14, 15.

The remark in the opinion of the State Supreme Court, that the only proceedings in New York referred to in the case were suits to which the defendant in error was not a party, seems to be erroneous as a matter of law. The New York case was between Simon and Frank Rothschild, plaintiffs, and James McKeon, defendant (Record, p. 36). The Massachusetts proceedings were between Robert A. Knight . . . in his capacity as assignee in insolvency of James McKeon, plaintiff, and Simon and Frank Rothschild, defendants, and sundry persons as trustees merely. (Record, p. 20.)

Mr. Justice Story, in his "Conflict of Laws," section 412, states the law as follows: "Assignees in bankruptcy or insolvency are in the same situation as the bankrupt himself in regard to foreign debts. They take subject to every equity belonging to foreign creditors."

And Massachusetts courts have stated the same principle as to domestic creditors.

Pratt *v.* Wheeler, 6 Gray, 520, 523.

Consequently, while Knight, assignee, was not a party to the New York suit, he is a privy to it and bound by it.

So close is this privity that Massachusetts courts have held that an assignee in insolvency might bring a writ of error to reverse a judgment against his insolvent.

Johnson *v.* Thaxter, 7 Gray, 242.
Johnson *v.* Thaxter, 12 Gray, 198.

The addition of trustees did not change the status of the parties; the pleadings show the only controversy being litigated was between the same parties, plaintiff and defendant, in both actions, and that the claim sued for in Massachusetts was for the identical goods attached in New York, and there sold under judicial decree to satisfy a debt due to the plaintiffs in error. (Record, pp. 36, 37, 41, 53, 16.)

While a judgment of the court of a sister state must under the constitution and laws of the United States be given full faith and credit if proved as provided by federal law, such method of proof is not exclusive; and if the laws or practice of a state permit other proof, and such proof is admitted, the judgment is equally entitled to full faith and credit.

Raynham *v.* Canton, 3 Pick. 293, 295.
Capen *v.* Emery, 5 Met. 436.
Kingman *v.* Cowles, 103 Mass. 283.
Brainard *v.* Fowler, 119 Mass. 262, 265.
Kean *v.* Rice, 12 S. & R. (Pa.) 203, 208.
Biddis *v.* James, 6 Binn, 321, 326.
Ex parte Powell, 3 Leigh. 816, 817.

The evidence of the New York proceedings being introduced by the plaintiff below, it was an admission by him and dispensed with other proof. The rule is stated in Comm. *v.* Desmond, 5 Gray, 80, 82: "Admissions made in the course of judicial proceedings are substitutes for and dispense with the actual proof of facts."

The same rule has been established by the federal courts.

Oscanyan *v.* Arms Co., 103 U.S. 263.
Ritchie *v.* McMullen, 159 U.S. 235.

And in so far as the evidence relating to the New York proceedings was oral, it being uncontroverted, it must be taken to be true.

The "Silver Moon," F.C. 12,856.
U. S. *v.* Chaffee, F.C. 14,774.
McNair *v.* McLennan, 24 Pa. St. 384, 385.

These admissions and this evidence being before the Court without objection or limitation were entitled to their full probative effect.

Damon *v.* Carroll, 163 Mass. 404, 407.

The federal courts hold that evidence of the subject-matter, of the action upon it, that the judicial power arose, and that it was exercised, is sufficient to establish the validity of a judgment.

Simmons *v.* Paul, 138 U.S. 454.

The Massachusetts courts have held that the requisite evidence must show the subject-matter, the jurisdiction, and the judgment.

Knapp *v.* Abell, 10 Allen, 485, 488.

The admissions and evidence in this case show that there was before the state court uncontroverted evidence of the subject-matter of the suit in New York (Record, p. 35), the action upon it is shown (Record, pp. 37, 41, 45, 53), the jurisdiction is shown to have arisen by attachment and personal service of summons in New York (Record, pp. 37, 41, 45, 53), and the exercise of the judicial power by sale is shown on pages 41, 45, and 53 of the record.

These admissions and this uncontroverted evidence sufficiently establish the New York proceedings under both the federal and state rules.

Under this showing of facts the state court should have followed the uninterrupted run of decisions of this Court that "the judgments of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced."

Hampton *v.* McConnell, 3 Wheat. 234, 235.
Huntington *v.* Attrill, 146 U.S. 657.

The theory of the trial court was that an offence had been committed against the insolvency laws of Massachusetts, that the liability arose from that offence, and that it was immaterial what became of the goods afterward, and instructed the jury to disregard the judicial proceedings in New York.

Counsel have already argued that the plaintiffs in error as non-residents owed no duty to the state insolvent law, and were not bound by it; that they had a right to take their pay when and where they could get it; that that right existed at any time before insolvency as well as at any time after insolvency, and that so far as non-residents are concerned the state power is limited to taking possession of the insolvent's goods within its jurisdiction and distributing them. If this is true, as counsel assumes it to be, the judgment in New York was of vital effect and could not be attacked or reviewed on its merits by the courts of any other state. Until the Insolvency Court of the state of Massachusetts took possession of McKeon's goods he could ship them to anyone within or without the state, and, being lawfully in another state, the jurisdiction of Massachusetts over them was divested, and the laws of that other state alone governed the further acquisition of title to them, and the judicial sale of them carried with it a title clear of all liability for their value to the whole world.

Green *v.* Van Buskirk, 5 Wall. 307, 311.
Green *v.* Van Buskirk, 7 Wall. 139, 148.

The plaintiffs in error submit that on the authority of the prior decisions of this Court the insolvency law of Massachusetts in inflicting penalties and forfeitures and impairing contracts must be strictly limited to residents owing allegiance to the state and bound by its laws.

That the courts of Massachusetts failed to give full faith and credit to the judicial proceedings of the courts of New York when they ignored such proceedings fully admitted by the plaintiff below.

That the procedure in the courts below did not constitute due process of law.

Therefore the judgment of the Superior Court of Massachusetts should be reversed.

HARRY J. JAQUITH,
THOMAS J. BARRY,
Counsel for Plaintiffs in Error.

APPENDIX.

A.

Chap. 187, P.S. Mass., Writs of Error:

"SECTION 1. Writs of error in civil and criminal cases may issue, of course, out of the Supreme Judicial Court in vacation as well as in term time, and shall be returnable to the same court.

"SECT. 2. Questions of law (except upon pleas in abatement) and final judgments in civil actions in the Superior Court may be re-examined upon a writ of error, and reversed or affirmed, in the Supreme Judicial Court held for the same county, for any error in law or in fact, except as hereinafter provided. When the judgment is reversed the court shall render such judgment as the Superior Court should have rendered.

"SECT. 3. A judgment in a civil action shall not be arrested or reversed for a defect or imperfection in form which might by law have been amended; nor by reason of a mistake respecting the venue of the action; nor because the judgment is not in conformity with the allegations of the parties, if it is in conformity with the verdict; nor shall any error in law in a civil action in which the defendant appeared and a verdict was rendered, except such as occurs after verdict, be assigned in a writ of error. But nothing herein contained shall prevent either party from assigning an error affecting the jurisdiction of the court."

B.

Chap. 153, sect. 8, P.S. Mass., Supreme Judicial and Superior Courts: "Decisions of a justice of either court, upon pleas in abatement or on motions to dismiss for defect of form in process, shall be final on the question raised. On motions for a new trial, and in all cases, civil or criminal, whether according to the course of the common law or otherwise, a party aggrieved by an opinion, ruling, direction, or judgment of the court in

matters of law may allege exceptions thereto, and shall not be required in a jury trial to allege the same in writing before the jury retires to consider the cause. Such exceptions, being reduced to writing in a summary mode, shall be filed with the clerk, and notice thereof given to the adverse party before the adjournment without day of the term in which the exceptions are taken, and within three days after the verdict in the case, or after the opinion, ruling, direction, or judgment excepted to is given. For good cause shown, a further time, not exceeding five days, unless by consent of the adverse party, may be allowed by the court. The clerk immediately, on the filing of the exceptions, shall present them to the court. The exceptions being examined and found conformable to the truth shall be allowed by the presiding judge. In all cases the adverse party shall have an opportunity to be heard concerning the allowance of such exceptions."

C.

Chap. 164, P. S. Mass., Absent Defendants:

"SECTION 1. No personal action shall be maintained against a person who is out of the commonwealth at the time of the service of the summons, unless he had before that time been an inhabitant of the commonwealth, or unless an effectual attachment of his goods, estate, or effects is made on the original writ, except in cases in which it is otherwise specially provided.

"SECT. 6. If a defendant is absent from the commonwealth, or his place of residence is not known to the officer serving a writ, and no personal service is made on him, or if the service of a writ is defective or insufficient by reason of mistake on the part of the plaintiff or officer as to the place where or the person with whom the summons or copy ought to have been left, the court upon suggestion thereof by the plaintiff shall order the action to be continued from term to term until notice of the suit is given in such manner as the court may direct. In any case in which the defendant does not appear, the court may in its discretion order the action to be continued and further notice given to him in such manner as the court may direct."

Chap. 384, Acts of 1885:

"SECTION 2. The courts respectively shall be always open in every county, and there shall no longer be any terms thereof. Any business of the courts or the justices thereof respectively may be transacted at any time; but no such business shall be transacted on Sunday, except in respect of such applications as, in the opinion of the court or justice to whom the same may be made, shall be of pressing necessity. Sittings of the courts respectively shall be held as heretofore at the times and places appointed by the laws now in force for holding terms of the courts.

"SECT. 4. Whenever the terms of the courts respectively are referred to in any statute of this state for any purpose not otherwise herein provided for, such terms shall for the purposes of such statute be considered as commencing on the day appointed by law for the commencement of the regular sittings of the court and as ending on the day preceding the next such sittings."

D.

Chap. 183, P.S. Mass., Trustee Process:

"SECTION 3. When the action is brought in the Supreme Judicial Court or Superior Court, if all the persons named as trustee in the writ dwell or have usual places of business in one county, the writ shall be returnable in such county, otherwise it may be returnable in any county in which either of them dwells or has his usual place of business, without regard to the domicile of the other parties.

"SECT. 21. When a person who is summoned as trustee has goods, effects, or credits of the defendant intrusted or deposited in his hands or possession, such goods, effects, and credits shall be thereby attached and held to respond to the final judgment in the suit, in like manner as goods or estate attached by the ordinary process, except as hereinafter provided.

"SECT. 25. Any money or other thing due to the defendant may be attached, as herein mentioned, before it has become payable, if it is due absolutely and without any contingency; but the trustee shall not be compelled to pay or deliver it before the time appointed by the contract."

E.

Chap. 157, P.S. Mass., Insolvency Courts:

"SECTION 27. If it appears that there has been mutual credit given by the debtor and any other person, or mutual debts between them, the account between them shall be stated, and one debt set off against the other, and the balance shall be allowed or paid on either side.

"SECT. 33. A person who has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this chapter, shall not prove the debt or claim on account of which the preference was made or given, nor receive any dividend thereon.

"SECT. 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, with a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency, and that such payment, pledge, assignment, or conveyance is made in fraud of the laws relating to insolvency, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited.

"SECT. 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer, or other conveyance of any description of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the

laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede, or delay the operation or effect of, or to evade, any of said provisions, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the insolvency. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief."

F.

Chap. 161, P.S. Mass., Venue of Actions:

"SECTION 11. Every civil action for the recovery of a forfeiture (except actions in which the commonwealth is plaintiff and actions brought to recover money for the commonwealth) shall be brought in the county in which the offence was committed, unless a different provision is made in the statute imposing the forfeiture."